Supreme Court, U.S.
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No. 86-46

In The

Supreme Court of the United States

October Term, 1986

CHARLES A. WEIL,

Petitioner,

vs.

JOSEPH T. McCLOUGH and ERMYN STROUD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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APPENDIX

Appendix A—Affidavit With Attachments 1a

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PETITIONER'S SUPPLEMENTAL BRIEF

STATEMENT

The petitioner, Charles A. Weil, *pro se*, respectfully submits this supplemental brief pursuant to Rule 22.6 to call attention to matter not available at the time the petition for writ of certiorari was filed.

REASONS FOR GRANTING THE WRIT

Respondents' failure to answer the petition that could not adequately cover glaring errors of practice and abuse of discretion in District Court within the thirty pages per Rule 22.1 alluded to therein at pp. 5-6, 14, 27-28.

RESPONDENTS' MOTION FOR SUMMARY JUDGMENT WAS IMPROPERLY BROUGHT, INAPPROPRIATE AND IMPROPERLY GRANTED.

Facts

Petitioner's complaint alleges he beeped his horn to call policeman's attention to

"violations of law"

not

"massive traffic jam" (19a) *hors record*; "massive traffic jam" (18a) *hors record*

per District Court opinion, demurred to eleven times to Circuit Court plus

"gridlock"

violative of State Vehicle & Traffic Law and New York City Traffic regulations, nineteen times (main brief); twice in reply brief, once again in petition for rehearing *en banc* to no avail.

Respondents never denied such "misapprehensions", and Circuit Court "misapprehended" it as

"traffic conditions" (4a)

likewise *hors record*.

Petitioner also alleged he

> signaled with his arm to a police officer (par. 6), said officer ignored said arm signal, whereupon—made a—beep on his horn (par. 7).

But District Court found

> a police officer acknowledged his hand signal

(20a) also *hors record*, to obviate addressing the privileges and immunities clause (Petition p. 5).

RESPONDENTS' MOTION TO DISMISS WAS IMPROPERLY BROUGHT.

Said motion was brought on March 12, 1985 after District Court's order of January 17, 1985 which called only for *memoranda* addressing constitutional questions (19a). Respondents, however, waived Brief in Opposition dated July 17, 1986 on which petitioner had relied for a Reply Brief to bring out adequately vital errors of practice below, because of space limitations of Rule 21.4, so as to cover the facial unconstitutionality of the regulation, *pro bono publico** (45a).

SUMMARY JUDGMENT WAS INAPPROPRIATE.

Said motion herein is one of instances where such judgments

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* There was only space to merely mention such blatant errors at pp. 5-6, 14, 27-28 of petition.

are undesirable. (Moore's Manual of Federal Practice and Procedure (2d Ed.), Rule 56.772; *Board of Education v. Pico,* 102SCT2799, 457 U.S. 853)

> "Any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party" (*Adickes v. S. H. Kress,* 398 U.S. 144, 157-9). "Furthermore, on summary judgment the inference to be drawn from the underlying facts contained in the affidavits . . . must be viewed in the light most favorable to the party opposing the motion" (*United States v. Diebold, Inc.,* 369 U.S. 654, 655).

Accord: Arnstein v. Porter, 154 F. 2d 389; *Hurtado v. United States,* 410 U.S. 478.

In a matter, significantly, *pro se*

> "The nature of their allegations make it even more important than usual that plaintiff not be deprived because of their ignorance of the role of affidavits under Rule 56(c) of a full and fair opportunity to pursue their claims." *Madyum v. Thompson,* 657 F. 2d 868, 877; *Haines v. Kerner,* 404 U.S. 519; *Carter v. Stanton,* 405 U.S. 669; *Yusof Asad v. Thompson,* 657 F. 2d 868; *Rodriguez v. Board of Education,* 620 F. 2d 320

District Court overlooked summary judgment is particularly inappropriate when

> ". . . underlying issue is one of constitutionality, motivation, intent or some other subjective fact . . ." *Shepard* p. 352; *Conrad v. Delta Airlines,* 494 F. 2d 914

and when it casts aspersion on petitioner's motive to inform of violation of law (19a)

> ". . . that he was not simply expressing his fustration . . " (*hors record*)

THE MOTION WAS IMPROPERLY GRANTED.

The Court never alerted petitioner of his right to amend his complaint, set date for hearing of the motion and denied petitioner's motion for supplementary pleading, April 19, 1985. Then the motion was granted on gross distortion of the petitioner's clear pleading relative violations of law, to which petitioner called the officer's attention, *supra. Rodriguez v. Board of Education,* 620 F. 2d 320

All well-pleaded allegations must be taken as true. *Dayco v. Goodyear Tire & Rubber,* 523 F. 2d 389; *Arnstein v. Porter,* 154 F. 2d 464.

Under Rule 56, summary judgment cannot be granted unless there is no genuine issue as to any material fact. *Carter v. Stanton, supra; Shepard, supra,* at p. 350, 351, 359.

District Court is not authorized to resolve issues of fact on a motion for summary judgment. *Choudry v. Jenkins,* 559 F. 2d 1085, 1086, 1089, *cert. denied,* 434 U.S. 997.

Also, where District Court overlooked, care must be taken to give the parties an opportunity to present materials in opposition. *Filli Marettis v. Continental Grain Co.,* 563 F. 2d 563; *Dale v. Hahn,* 440 F. 2d 33 at 8; Moore, 56.32, *supra*; *Blanks v. Register,* 493 F. 2d 697; *Deborah Gordon v. National Youths World Alliance,* 675 F. 2d 367; 2A Moore, 12.09, 2300; *Cortello v. Pauline Sports, Inc.,* 381 F. 2d 81, 85.

Petitioner had two rights to amend his pleading:

1. because of intervening events, not available when the complaint was served, a year previous, and

2. because of motion for summary judgment to dismiss, the latter is absolute, a matter of right (*Rogers v. Girard Trust*, 159 F. 2d 239); and denial of opportunity to present all material facts (*Blanks v. Register*, 493 F. 2d 697); by alerting petitioner of said right to amend and set date for argument on the motion, a *fortiori* since petitioner was *pro se* (*Yusuf V. Assad v. Thompson, supra, Board of Education v. Pico, supra; Labatt v. Twomy*, 513 F. 2 641; Rule 56(c).

Such right to amend was also held necessary (*Zenith Radio Co. v. Hazelton*, 401 U.S. 321; *Shuman v. Hallbauer*, 455 F. 2d 1236, 1242; Rule 15(a) and (d)); and it was held an abuse of discretion to grant a motion without same (*Enochs v. Sisson*, 301 F. 2d 125; *Davis v. Howard*, 561 F. 2d 565).

It could have granted either right to amend, but not deny both. The second because of mislabelling. Mislabelling has been held immaterial. (Moore, 56.02 *supra; Lyman v. Livingston*, 257 F. 2d 520; *Nycoseal, Inc. v. Parke Davis*, 28 F.R.D. 24; *Schuckman v. Rubenstein*, 164 F. 2d 952, *cert. denied*, 333 U.S. 875; Federal Practice and Procedure, 1360, 1373, Wright, Miller Cooper.

It is submitted the waiver of Brief in Opposition dated July 17, 1986 was an "intervening matter not available at the time of the party's last filing." (Rule 22.6)

CONCLUSION

Petitioner submits that the writ should be granted due to the failure of respondents to answer the petition that could not cover glaring errors of practice and abuse of discretion below within the thirty pages per Rule 22.1

If a court may torture the plain words of a plaintiff's complaint to preempt addressing violation of a constitutionally protected right; privilege and immunity clause; it is contrary to rule that plaintiff's pleading on motion for summary judgment to dismiss must be assumed to be true. If a municipal body may legislate an ouster of this Court's jurisdiction by mislabelling a penalty as civil when clearly penal, it spells the end of all constitutionally protected rights to the man in the street.

Respectfully submitted,

CHARLES A. WEIL
Petitioner, pro se

APPENDIX A—AFFIDAVIT WITH ATTACHMENTS

No. 86-46

In The
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vs.

JOSEPH T. McCLOUGH and ERMYN STROUD,.

Respondents.

AFFIDAVIT

CHARLES A. WEIL being duly sworn deposes and says:

I am plaintiff-petitioner, *pro se*, in above entitled matter and fully conversant with its facts and proceedings.

1. Respondent's motion for summary judgment dismissing the petition herein was brought improperly March 12, 1985, after District Court's order, January 17, 1985 (Ex. A) which called for submission of memoranda *only*, addressing only constitutional questions.

2. Petitioner had pleaded he beeped his horn *only* to call attention to "violations of law", (sic) not "massive traffic jam" (19a) as found by District Court and specifically "gridlock", violation

Appendix A

of New York State Vehicle and Traffic Law and New York City Traffic Regulation, and other Traffic Regulations.

3. District Court never alerted petitioner of his rights to amend the complaint or set date for hearing on motion to dismiss; but,

4. Denied petitioner's motion for supplementary pleading of occurrences and events a year after the complaint.

5. District Court's opinion made findings grossly distorting plaintiff-petitioner's pleading (*supra,* Par. 2) relative violations of law, while Circuit Court misapprehended it as "about traffic conditions" (4a).

6. Respondents, on July 17, 1986, waived brief in opposition, on which petitioner had planned, to fully cover, by reply, errors of practice herein below, by restriction to 30 pages of Rule 21.4, in order more fully to cover the facial aspects of unconstitutionality of the regulation herein, *pro bono publico.*

s/ Charles A. Weil

Sworn to before me this
29th day of August 1986

s/ Darlene Williams
DARLENE WILLIAMS
Notary Public, State of New York
No. 41-4809364
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1988

Appendix A

EXHIBIT A

ENDORSEMENT

CHARLES A. WEIL v. JOSEPH T. McCLOUGH et al., 84 Civ. 3730 (GLG)

Motion granted to the extent that the defendants will serve opposing papers by February 28, 1985, with the plaintiff serving his responding papers by March 25, 1985. The Court will then address the constitutional issues.

SO ORDERED.

Dated: New York, N.Y.
January 17, 1985

s/ Gerard L. Goettel
GERARD L. GOETTEL
U.S.D.J.

Appendix A

EXHIBIT B

THE CITY OF NEW YORK

LAW DEPARTMENT
100 Church Street
New York, N.Y. 10007

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel

July 17, 1986

Hon. Alexander L. Stevas
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Charles A. Weil v. McClough et ano.*
(Docket No. 86-46)

Dear Sir:

The Corporation Counsel of the City of New York represents Joseph T. McClough and Ermyn Stroud, respondents herein. In view of the fact that this case clearly does not warrant review by this Court, respondents waive their right to file a brief in opposition to petitioner's application for a writ of certiorari.

Respectfully submitted,

FREDERICK A.O. SCHWARZ, JR.,
Corporation Counsel of the City of New York

Appendix A

By: s/ Ellen B. Fishman

ELLEN B. FISHMAN
Assistant Corporation Counsel
Appeals Division

cc: Mr. Charles A. Weil
Petitioner Pro se
485 Park Avenue
New York, New York 10022

Appendix A

EXHIBIT C

COUNTY OF NEW YORK PERSONAL SERVICE

I, Angel Diaz, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1670 Southern Blvd., Bronx, NY 10060.

On 8-5-86 deponent served the within Petition for Certiorari pages 13 & 14 upon:

Frederick A. O. Schwarz Jr.
100 Church Street, New York, NY 10007

the Attorney(s) in this action by delivering 3 true copy(ies) thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein.

Sworn to before me
8-5-86

s/ Angel Diaz
Angel Diaz

(Weil AAS-7 Weil v. McClugh)

s/ Robert T. Brin
ROBERT T. BRIN
Notary Public, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1987

Appendix A

EXHIBIT C1—PAGE 14

"penal in nature" and governed in New York State by the "criminal law".

The opinions completely misapprehend what is completely *hors record* (and completely refuted by supplemental pleadings #9, 10, 19, and he had to be completely blind not to have been aware of, the "condition" but that its *causes* were the violations. Petitioner deemed it his right and duty to exercise his constitutional rights per privilege and immunity clause to inform him of *violations of law* while there were undisputed violations of the Fourteenth Amendment's clauses: equal protection, due process, and privileges and immunities, denied facts and circumstances.

On the desperately repugnant proposition, never raised by respondents, inconsistent with the memorandum decision dated November 16, 1984 (App. 13a) citing no authority, significantly never raised prior to their March 11, 1985 memorandum, and then only to evade the strict scrutiny test per petitioner's Point II

the relatively light civil penalty

courts below were misled relative the "civil" penalties by respondents' glaring misstatements in their March 11, 1986 memorandum

> the regulation imposes only civil penalties
> enactment with civil rather than criminal penalties.

There is no such imposition or enactment in Sec. 1403.3-4.05(1). It is only on the *sui generis* instrument and overlooking the charge herein is penal in nature and the Supreme Court's crucially contrary

per curiam ruling (*Drew v. Maryland,* 381 U.S. 421 at 423 fn., relative a $25 fine).

> This Court has said (and I hope never does) let the fact that the criminal penalty is relatively small, stand in the way of reviewing a case presenting